

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING
A JUDGE NO. 02-487

Supreme Court Case
No.: SC03-1171

**RESPONDENT'S MOTION IN LIMINE TO
EXCLUDE TESTIMONY OF DAVID LETA**

The Honorable Gregory P. Holder ("Judge Holder" or "Respondent"), by counsel, files with the Hearing Panel of the Florida Judicial Qualifications Commission (the "Panel") this Motion in Limine to Exclude Testimony of David Leta.

1. David Leta ("Leta") is a Colonel in the United States Air Force Reserves. Leta was responsible for the Air Force's investigation of Judge Holder concerning his alleged plagiarism of an Air War College Paper.

2. Judge Holder's counsel made a telephonic request to depose Leta.¹
See Exhibit 1.

3. A Department of Defense ("DOD") employee may only testify to those pre-approved "facts" or areas of inquiry by the DOD prior to the date of testimony. 32 C.F.R. Part 97.

¹ Leta is noticed for Deposition before the expiration of the discovery cutoff. At this time, Judge Holder is unsure if Leta's scope of testimony will be expanded. Therefore, Judge Holder is filing this motion to preserve his objection. If appropriate, a supplemental memorandum will be filed to update the Panel following Leta's deposition.

4. Acting under the authority of 32 C.F.R. Part 97, the DOD refused Judge Holder's request to depose Leta, unless Judge Holder disclosed attorney work product. *See* Exhibit 1.

5. The Panel does not have the power to compel Leta to respond to Judge Holder's request to take Leta's deposition. *State v. Tascarella*, 580 So. 2d 154 (Fla. 1991).

6. The Judicial Qualification Commission ("JQC") intends to introduce the testimony of Leta to identify a statement of Colonel Gregory P. Holder dated March 7, 2003. *See* Florida Judicial Qualification Commission's Prehearing Statement, filed August 25, 2004.

7. Where the Department of Justice ("DOJ") will not allow its employee to attend a pre-trial deposition, the Florida Supreme Court held that exclusion of all testimony of a DOJ employee is appropriate. *State v. Tascarella*, 580 So. 2d 154 (Fla. 1991) (The trial court excluded all trial testimony of DOJ employees because Tascarella was not afforded an opportunity to depose them prior to trial. The Florida Supreme Court agreed that Tascarella, "would be prejudiced if forced to confront these witnesses at trial without pretrial discovery," and exclusion of all their testimony at trial was proper).

8. Pursuant to *Tascarella*, Leta must be excluded from testifying at the Final Hearing. Judge Holder is prejudiced by the DOD's refusal to allow Judge Holder to discover facts known by Leta prior to the Final Hearing.

9. Finally, under Section 90.403, Florida Statutes, the prejudicial nature of the evidence outweighs any probative value.

WHEREFORE, Judge Holder requests that this Panel enter an order excluding all testimony of David Leta at the Final Hearing.

Dated: August 25, 2004

Respectfully Submitted,



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Counsel for Judge Gregory P. Holder

CERTIFICATE OF SERVICE

I certify that on August 25, 2004, a copy of the foregoing has been served by U.S. Mail to Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; and by telecopier and U.S. Mail to: Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629.



Attorney



DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY (AFLSA)

20 JAN 2004

AFLSA/JACL
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Virginia Z. Houser, Esq.
BALES WEINSTEIN
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Dear Ms. Houser

I have been advised of your telephonic request to depose Col David Leta, USAFR, in the case Inquiry Concerning A Judge, No. 02-487, before the Florida Judicial Qualifications Commission, case number 03-1171. I understand Col Leta's involvement in the case relates to the investigation that he conducted at the direction of the Commander, Air Reserve Personnel Center, into allegations of misconduct made against your client Col Gregory Holder, USAFR. The request to depose Col Leta has been referred to this office for action.

Congress has affirmatively given federal agencies the right to enact certain "housekeeping rules" to govern how agency information will be disclosed. The enabling statute is 5 U.S.C. § 301, which states, in part:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

In addition, the Supreme Court has specifically recognized the authority of agency heads to restrict testimony of their subordinates via such regulations. The principal case in this area is *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 95 L. Ed. 417, 71 S. Ct. 416 (1951). In *Touhy*, the Court dealt with a rule promulgated by the Justice Department requiring their employees to refuse to obey a *subpoena* if so instructed by the Attorney General. The Court held that the housekeeping regulation was valid and provided the employee with an absolute privilege to refuse to obey a *subpoena*. *Id.* at 464.

The Secretary of the Air Force, as the head of the agency, has prescribed regulations governing the release of official Air Force information, whether the release is accomplished through the production of documents or the testimony of current or former Air Force personnel. The Secretary has also delegated to our office the responsibility to review all witness requests and demands for the release of such information, including *subpoenas*, in cases in which the United States is a party to the litigation. See 32 C.F.R Part 97; Department of Defense Directive

EXHIBIT

1

5405.2, Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses; and Air Force Instruction 51-301, *Civil Litigation*, Chapter 9 (known collectively as the "*Touhy* regulations").

We cannot approve your request at this time because it does not provide the information required by the Air Force *Touhy* regulations. Please make your request in writing to this office and include, in addition to the date, time, and location of the requested appearance of the witness or the production of the documents:

- (1) A detailed explanation of the subject matter and nature of testimony or information sought;
- (2) A detailed explanation of the relevance of the testimony or information to the litigation;
- (3) A detailed explanation of what interest, if any, the Air Force or Department of Defense may have in releasing this information.

In the absence of such a written request and its approval, Col Leta is not authorized to appear and testify at a deposition concerning official Air Force information.

If you have any questions, please contact Lt Col Perry Peloquin, (703) 696-9108.

Sincerely,



LAURENCE M. SOYBEL, Colonel, USAF
Chief, General Litigation Division

cc:

Col Leta

AFLSA/PR (Col Jaster)